must receive some portion thereof, yet commissioners are authorized so to divide the estate as to occasion the smallest practical amount of injury to the whole, and to equalize the parts, if necessary, by compensation in money. From the description of the estate, as given in the case, the Court are of opinion that such a division may be made without destruction to the property, or seriously impairing its value.

Judgment must therefore be entered for partition.

WELLS, and HOWARD, J. J., concurred.

SHEPLEY, C. J., and HATHWAY, J., concurred in the result.

New York Court of Appeals, June Term, 1853.

PETER BREASTED ET AL, ADMINISTRATORS &C. OF HIRAM COMFORT, DECEASED, RESPONDENTS, *vs.* THE FARMERS' LOAN AND TRUST COMPANY, APPELLANT.

To an action on a policy of insurance on life, which contained a proviso that if the assured should "*die by his own hand,* or in consequence of a duel, or by the hands of justice, or in the known violation of any law of the State, or of the United States," the defendants pleaded that the deceased committed *suicide by drowning himself,* and so died by his own hand. Replication, that at the time the deceased so committed suicide, &c., he was of *unsound mind,* and *wholly unconscious of the act. Held* good.

This action was commenced in the late Supreme Court of New York, of May Term, 1841, and was brought upon a policy of insurance upon the life of Hiram Comfort, the plaintiff's intestate. The policy was dated on the 17th April, 1839, and was for the period of seven years. It was in the usual form of life policies and contained this clause: "Provided always, and it is hereby declared to be the true intent and meaning of this policy, and the same is accepted by the assured upon the express condition, that in case the said Hiram Comfort shall die upon the seas, (the party being con-

sidered as at sea from the time he embarks or goes on shipboard, until he lands,) or shall, without the consent of this company, previously obtained and endorsed upon this policy, pass beyond the settled limits of the United States, (excepting into the settled limits of the British Provinces of the two Canadas, Nova Scotia or New Brunswick,) or shall, without such previous consent thus endorsed, visit those parts of the United States which lie north of the southern boundaries of the States of Virginia and Kentucky: or shall, without such previous consent thus endorsed, enter into any military or naval service whatever, (the militia not in actual service excepted,) or in case he shall *die by his own hand, or in consequence of a duel, or by the hands of justice, or in the known violation of any law of this State, or of the United States*, or of the said Provinces, this policy shall be void, null and of no effect." The declaration averred, that the said Comfort, after the making the said policy and before the termination of the time therein mentioned, to wit, on the 25th June, 1839, at Catskill, in the county of Greene, departed this life, and then and there died, *not by his own hand, or in consequence of a duel, or by the hands of justice, or in the violation of any law of these states, or of the United States, &c. &c.*

The defendants pleaded, 1st, the general issue, 2d, *actio non &c.*, because the said Hiram Comfort committed suicide by then and there drowning himself in the Hudson river, &c., &c., and so they say that he died by his own hand, and concluding with a verification. 3d. *Actio non &c.*, because they say that the said Hiram at, &c., did then and there cast and throw himself into the Hudson river, at the place aforesaid, by means of which he was then and there suffocated and drowned, of which drowning he then and there instantly died, and so they say that the said Hiram killed himself and died by his own hand, which is the same death, &c., concluding with a verification.

To the second plea the plaintiff replied, that at the time the said Hiram committed suicide by then and there drowning himself in the Hudson river, *he was of unsound mind, and ansconscious of the act*, concluding with a verificaiion.

To the third plea was a like replication, that the said Hiram at

the time he throwed himself in the Hudson river, by reason of which he instantly died, *he was of unsound mind, and wholly unconscious of the act*, concluding with a verification.

The defendants demurred to both replications, and the plaintiffs joined in the demurrer.

The Supreme Court in January Term, 1843, gave judgment for the plaintiffs on the demurrer. (See 4 Hill, 73.)

In July, 1845, the other issue was referred by the Supreme Court of the third district to referees to hear and examine the matters in controversy. The cause was tried before the said referees, who on the 27th August, 1846, reported in favor of the plaintiff, the sum of seven thousand and twenty-six dollars and thirteen cents, allowing interest on the policy from sixty days after the first notice. The report of the referees contains the whole testimony in the cause, and they found specially among other things, "That the assured on the 25th day of June, 1839, threw himself into the Hudson river, from the steamboat Erie, while insane, for the purpose of drowning himself, not being mentally capable at the time, of distinguishing between right and wrong."

The Supreme Court, in the third district, in January, 1849, refused to set aside the report, and gave judgment for the plaintiff thereon. The defendants appealed to this Court.

W. C. Noyes, for the appellant.

S. Sherwood, for the respondent.

WILLARD, J.—The question raised by the decision of the referees, is substantially the same as that decided by the Supreme Court on the demurrers. It will be unnecessary to give to each, a separate examination.

It is material to determine in the first place, what is meant by the terms *death by his own hands*, which is to avoid the policy. If the words are construed according to the *letter*, an accidental death occasioned by the instrumentality of the *hand* of insured, would fall within the exception. Thus, should the insured by mistake, swallow poison, and thereby terminate his life, his representatives could not recover on the policy, if the poison was conveyed to his mouth

by *his own hand.* The same rule of construction applied to the words death *by the hands of justice*, in the same connection, would take the case out of the exception, if the death was occasioned by strangulation by a *rope* instead of the *hands* of the minister of justice. But it is too plain for argument, that the *literal* meaning is not the true meaning of either phrase. Death by *the hands of justice* is a well known phrase denoting an execution, either public or private, of a person convicted of crime, in any form allowed by law. The moral guilt of the party executed has nothing to do with the definition. Socrates, though he took the poison from his own hand, died by the hand of justice, in this sense of the term. It would be an abuse of language to charge him with an act of intentional self-destruction. The martyrs who perished at the stake, in like manner, "died by the hands of justice."

In popular language, the term *death by his own hand*, means the same as *suicide* or *felo de se.* The two first, indeed, are not technical terms, and *may* be used in a sense excluding the idea of criminality. The connection in which they are used in this policy, indicates that the phrase *death by his own hand*, meant an act of criminal self-destruction. Provisoes declaring the policy to be void in case the assured *commit suicide* or *die by his own hand*, are used indiscriminately as expressing the same idea. In the note to *Borradale* vs. *Hunter*, 5 Man. & Gr. 648, are given the forms of the proviso used by seventeen of the principal London Insurance Companies. In eight of them, the exception is of a death *by suicide*, and in nine, of a death by *the assured's own hands.* In two, a separate provision is made in case of a death by *suicide*, not *felo de se.* It is obvious, therefore, that the phrase death by *his own hand* and death *by suicide*, mean the same thing, and that both, unless qualified by some other expressions, import a criminal act of self-destruction. The connection in which they stand in this policy, favors this construction. The first four exceptions in the policy, are of acts innocent in themselves, three of which become inoperative, if the defendants give their consent, and have it endorsed on the policy. Then follow the last four exceptions, viz: *if he shall die by his own hand*, or in *consequence of a duel, or by the hands*

of justice, or in the known violation of any law, &c., by the acknowledged rule rule of construction, *nosctur a sociis*, the first members of the sentence, if there be any doubt in its meaning, should be controlled by the other members, which are entirely unequivocal, and should be construed to mean a felonious killing of himself. Broome's Maxims, 450, 293. It is a rule laid down by Lord Bacon, that *copulatio verborum indicat acceptationem in eodem sensu;* the coupling of words together shows that they are to be understood in the same sense. And when the meaning of any particular word is doubtful or obscure, or when the expression, taken singly, is inoperative, the intention of the parties using it may frequently be ascertained and carried into effect by looking at the adjoining words, or at expressions occurring in other parts of the same instrument for *quæ non valeant singula juncta juvant.* Bacon's Works, vol. 4, p. 26, 2; Broome's Maxims, 293. Besides, the words in this case are those of the insurer, and if susceptible of two meanings, should be taken most strongly against him.

It was not contended on the part of the defendant, that the policy would be avoided by a mere *accidental* destruction of life by the party himself. It was urged that it would be, if the act was done *intentionally*, although under circumstances which would exempt the party from all moral culpability. It was insisted that the expression must be taken to mean a death *by his own act.* It seems to me this is a yielding of the whole question. An insane man, incapable of discerning between right and wrong, can form no intention. His acts are not the result of thought or reason, and are no more the subject of punishment than those which are produced by *accident.* The acts of a madman, which are the offspring of the disease, subject him to no criminal responsibility. If the insured, while engaged in his trade as a house-joiner, had accidentally fallen through an opening in the chamber of a house he was constructing, and lost his life, the argument concedes that the insurer would have been liable. The reason is, that the mind did not concur with the act. How can this differ in principle from a death in a fit of insanity, when the party had no mind to concur in or oppose the act?

It must occur to every prudent man, seeking to make provision for his family by an insurance on his life, that insanity is one of the diseases which may terminate his being. It is said the defendant did not insure the continuance of the intestates reason. Nor did they in terms, insure him against smallpox or scarlet fever; but had he died of either disease, no doubt the defendant would have been liable. They insured the continuance of his life. What difference can it make to them, or to him, whether it is terminated by the ordinary course of the disease of his bed, or whether in a fit of delirium he ends it himself? In each case, the death is occasioned by a means within the meaning of the policy, if the exception contemplates, as I think it does, the destruction of life by the intestate while a rational agent, responsible for his act.

It is competent, no doubt, for the insurer so to frame his policy, as to exclude him from liability for a death occasioned in a fit of insanity. The parties have not done so in the present case.

It was urged, that because a person *non compos mentis* is liable *civiliter* for torts committed while in a state of insanity, therefore insanity has no effect to qualify this exception in the policy. That conclusion is not a legitimate deduction from the premises. A rational man is liable *civiliter* for an injury occasioned by an accident, unless it be an inevitable one, and yet no one pretends that the insurer is not liable for a death by accident, whether inevitable or not. Indeed, the liability for deaths by accident was conceded on the argument. A death by accident, and a death by the party's own hand when deprived of reason, stand, on principle, in the same category. In both cases, the act is done without a controlling mind. If the insurer is liable in one case, he should be in the other.

If the insured was compelled by *duress* to take his own life, it will hardly be contended that the insurer could avoid payment. In what consists the difference between the duress of man, and the duress of Heaven? Can a man be said to do an act prejudicial to the insured, when he is compelled to do it by irresistible coercion; and can it make any difference, whether this coercion comes from the hand of man or the visitation of Providence?

But, it is urged that this is a civil action, and the contract of

insurance a civil contract. Be it so. A person so destitute of reason as not to know the consequence of his acts, can make no valid contract. Whether the incompetency be the result of disease or of intoxication, his contracts made while in that condition, are void. *Barret* vs. *Baxter*, 2 Aiken Vt. R. 167, approved by Ch. Walworth, in *Prentice* vs. *Aehorn*, 2 Paige, 31, and by Ch. Kent, in 2 Commentaries, 451; Smith's Law of Contracts, 324–333 and notes. If the party could do no act to bind himself, he certainly could do none to discharge the insurer. If he could not make a bond, he could not make a release. If he could not make a will, he could not revoke one.

The liability of a lunatic for necessaries, rests upon the ground that the law will raise a contract by implication on the part of the lunatic, in favor of the party who has supplied them in good faith, and therefore does not affect the present question. *Wentworth* vs. *Tubbs*, 1 Young & Col. N. C. 171. The cases on this head, are analogous to that of an infant. See Smith's Law of Contracts, 325, et seq. and notes, where the cases are collected and reviewed. The law to prevent a failure of justice, will *imply a promise* by a party incapable of making a contract; but it will never imply that a party incapable of distinguishing between right and wrong was guilty of fraud.

At the time this case was decided by the Supreme Court on the demurrer, there had been no case, either in this country or in England, in which the same question had arisen. The case of *Borradale* vs. *Hunter*, 5 Man. & Gr. 639, decided by the English Common Pleas in 1843, has since been reported. That action was brought by the executor of the insured, upon a life policy containing a proviso, that in case the assured should die by his own hands, or by the hands of justice, or in consequence of a duel, the policy should be void. The assured threw himself into the Thames, and was drowned. Upon an issue, whether the assured died by his own hands, the jury found, that he *voluntarily* threw himself into the water, *knowing* at the time that he should thereby destroy his life, and intending thereby to do so; but at the time of committing the act he was not capable of judging between right and wrong. It was

held by a majority of the Court, Tindal, Ch. J., dissenting, that the policy was avoided, as the proviso included all acts of *voluntary* self-destruction, and was not limited by the accompanying provisoes to acts of felonious suicide. The judges who formed the majority, laid the main stress upon the fact, that the jury found the act of self-destruction to be *voluntary*, that he knew when he threw himtelf into the river he should thereby destroy his life, and that he intended thereby to do so. The referees in the present case, have not found that the intestate acted *voluntarily*, or that he *knew* the consequence of his act. They merely find, that while insane, for the purpose of drowning himself, he threw himself into the river, not being mentally capable of distinguishing between right and wrong. If *Borradale* vs. *Hunter* be an authority which we ought to follow, it differs so much from the case before us, that we are at liberty to decide it upon principle.

After the case of *Borradale* vs. *Hunter*, the case of *Schwabt* vs. *Clift* was tried at Nisi Prius, before Crosswell, J. It was upon a policy upon the life of the plaintiff's intestate, containing the proviso, that if the assured should "*commit suicide*, or die by duelling, or by the hands of justice, the policy should be void." The assured died from the effects of sulphuric acid taken by himself, but evidence was given tending to show, that at the time he took the sulphuric acid, he was in fact of unsound mind. In his charge to jury, the learned Judge said, that to bring the case within the exception, it must be made to appear that the deceased died by his own *voluntary* act; that at the time he committed that act, he could distinguish between right and wrong, so as to be able to understand and appreciate the nature and quality of the act he was doing; and that therefore, he was at that time a responsible being. The jury found for the plaintiff. 2 Car. and Kirwan, 134. This cause was afterwards brought into the Court of Exchequer Chamber on bill of exception, and will be found in 3 Man. & Gr. 437, by the title of *Clift* vs. *Schwabt*. That Court, by a vote of four to two, ordered a new trial, holding that the direction was erroneous; for that the terms of the condition included all acts of *voluntary* self-destruction, and therefore, if A voluntarily killed himself, it was immate-

rial whether he was or was not, at the time a responsible moral agent.

This case is open to the same remark as *Borradale* vs. *Hunter*, supra. It turned upon the assumed fact, that the act of suicide was *voluntary;* a fact not found by the referees in this case.

Judgment affirmed.[1]

NOTE.—The vote of the Court in the foregoing case stood thus:
For Affirmation.—Ruggles, Ch. J., Willard, Morse, Mason, Taggart.
For Reversal.—Gardner, Jewett, Johnson.

Equity Court of Appeals, South Carolina.

SARAH P. DANNER *vs.* WILLIAM H. TRESCOT.

Conveyance by N. D. to H. F. in trust to have and to hold the premises "*unto the said H. F. and his heirs, to the use of the said H. F. and his heirs*, in trust nevertheless for the sole, separate and only use of S. D. (wife of the grantor), during the term of her natural life; so that the same shall in no manner be liable to my debts, contracts or engagements; and after her death, should the said S. D. survive me, the said N. D., and only in that event, then in trust to and *for the right* heirs of her the said S. D., *their heirs and assigns forever.*" S. D. survived her husband. *Held*, that the statute had not executed any of the uses; that the rule in Shelley's case applied, and that S. D. had an equitable fee.

The following opinion and decree were entered in this case in the Court below, at Charleston, by the Chancellor:

This is a bill for the specific performance of an executory contract for the sale of a house and lot in the town of Beaufort. By a written contract, dated the 29th of April, A. D. 1851, the plaintiff undertook to convey to the defendant the property in question,

[1] The propriety of the decision of Borradale *vs.* Hunter has been much questioned in England. See Bunnyen on Life Ins. 75; note to Dormay *vs.* Borradale, 5 Comm. B. 395.—EDS. L. R.